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HUMAN RIGHTS COMMITTEE

Fifty-sixth session

SUMMARY RECORD OF THE 1491st MEETING

Held at Headquarters, New York,
on Thursday, 28 March 1996, at 3 p.m.

Chairman: Mr. AGUILAR

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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Initial report of Guatemala (continued)

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Any corrections to the records of the public meetings of the Committee at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

96-80404 (E)

The meeting was called to order at 3.10 p.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (continued)

Initial report of Guatemala (continued) (CCPR/C/81/Add.7, HR1/CORE/1/Add.47)

1. At the invitation of the Chairman, Mr. Alonzo and Mr. Arranz (Guatemala) took places at the Committee table.

2. Mr. BRUNI CELLI asked how the Penal Code defined the crime of concubinage and whether it differed from adultery. He would also like to learn more about the military commissioners and the separation of military and police functions in Guatemala, particularly in conflict areas and Communities in Resistance (CPRs).

3. Mr. ALONZO (Guatemala) said that under article 235 of the Penal Code, if a mistress was maintained within the marital home, the husband could be imprisoned for a term of four months to one year and the mistress could be fined. However, the recent Constitutional review, had eliminated that provision.

4. Mr. ARRANZ (Guatemala) said that the system of military commissioners had a long history in Guatemala. It had begun because of the lack of representation of civil and military authority in remote areas of the country. The main function of the military commissioner was recruitment for mandatory military service, but he had also been given a certain degree of civil authority.

5. The Communities in Resistance (CPR) posed a serious problem because they did not accept any authority, military or civilian, in the territory under their control. Even the civilian police force was seen as an instrument of the oppressor State. In some areas where refugees and displaced persons had been resettled, a similar attitude towards government authority was developing, creating a major national problem, since no Government would find it acceptable that certain areas of the country should lie outside its authority.

6. Mr. ALONZO (Guatemala) said that under article 29 of the Constitution, foreigners in Guatemala had free and equal access to the courts. They would have recourse to diplomatic channels only in cases where justice had been denied. The right of peaceful assembly was recognized in article 33 of the Constitution. No permit was required to hold a meeting, although the proper authorities had to be notified in advance in the interest of maintaining public order. Article 45 should be read in conjunction with articles 175 and 204 as they related to the primacy of the Constitution in Guatemalan law. Essentially, the article provided that any act was permissible that did not contravene the Constitution, including resistance to civil authority in order to uphold a constitutionally guaranteed right.

7. Mr. ARRANZ (Guatemala) said that the law implementing article 70 of the Constitution on the rights of indigenous peoples had not yet been passed. Its main purpose would be to extend and complement the constitutional provisions on equal rights. In the meantime, failure to enact the legislation was partially

offset by the adoption of the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries and the Agreement on Identity and Rights of Indigenous Peoples. The commitments by the Government and the Unidad Revolucionaria Nacional Guatemalteca (URNG) under those instruments reduced the need for supplementary legislation.

8. Land tenure was among the most serious issues facing Guatemala. The adoption of ILO Convention No. 169 had been seen as legitimizing the Mayan peoples' claim to their historic lands. The issue had been addressed in part through the establishment of the Indigenous Peoples' Development Fund (FODIGUA), directed and managed by the indigenous groups themselves with a view to promoting their economic development. With international assistance, the Government was attempting to set up national land ownership registry and past abuses and excesses, including invasion and seizure of properties were being averted by bringing land ownership disputes before the courts, which would either approve evictions or confirm ownership. The Government was also conducting an extensive campaign of buying up land to sell or grant to refugees and displaced persons. As socio-economic and agrarian issues were the focus of the current negotiations between the Government and URNG, however, he could not provide further details.

9. Although the Government had not yet given official recognition to URNG, through the negotiating process under United Nations auspices it had entered into dialogue and was seeking a legal mechanism for bringing URNG into the political and social mainstream.

10. The Children's Code was currently undergoing its third reading in the Congress. Some deputies had expressed concern that Guatemala was not yet in a position to provide the psychological and medical assistance it required for all children. The Code differentiated between children and adolescents. Adolescents could be charged and convicted of crimes under the law, although they were usually sentenced to confinement in a reform school rather than to prison. Reform schools did not always provide the conditions for true rehabilitation, however, and that deficiency in the law must be addressed.

11. Mr. ALONZO, referring to paragraphs 51 and following of the report, said that a person awaiting trial could not leave Guatemala without permission from the court. The Government had cooperated fully with the Working Group on Enforced and Involuntary Disappearances and was up to date in submitting its reports. It had also provided additional information on a few individual cases when requested.

12. Mr. ARRANZ (Guatemala), reverting to a question from Mr. Klein, said that, under the Constitution, neither citizens of Guatemala nor foreign nationals could demand compensation for damages suffered as a result of the armed conflict. In the Comprehensive Agreement on Human Rights, however, the Government, along with URNG, had agreed that compensation or assistance to victims of human rights violations was a humanitarian right. The Agreement established criteria for the granting of such assistance and gave priority to those in greatest need.

13. Mr. PRADO VALLEJO expressed appreciation for the frank picture by the Guatemalan delegations of the true situation in that country, and commended the plans to overcome obstacles and change institutions where necessary through national reconciliation and the peace process. Nevertheless, he continued to be concerned about the effects of impunity and the continuing violence, despite the signing of the Comprehensive Agreement on Human Rights. The continued activities of civil self-defense patriots and the climate of fear in which judges, investigators and witnesses were compelled to perform their duties pointed to the need for major, long-term changes in national attitudes. It was his hope that secure peace would be established in Guatemala before the end of the century.

14. Mr. BHAGWATI asked for further details on the provision in the Civil Code authorizing a husband to oppose his wife's desire to work, which seemed to restrict equal employment opportunity.

15. Mr. ALONZO (Guatemala) said that he would make available the text of article 114 of the Civil Code, which stated that a husband could oppose his wife's desire to work outside the home if he could justify his position and earned enough income to maintain the household.

16. The CHAIRMAN invited attention to the second set of issues to be discussed in connection with the initial report, namely: cases where the provisions of the Covenant were directly invoked before the courts; steps taken to disseminate information in indigenous languages on the rights recognized in the Covenant and the content of the report to the Human Rights Committee; factors and difficulties affecting the implementation of the Covenant in Guatemala; measures to ensure gender equality and promote the participation of women at all levels of the life of the country; whether confession or testimony obtained under torture could be admitted in court proceedings; compliance with the United Nations Standard Minimum Rules for the Treatment of Prisoners; any restrictions imposed on the exercise of freedom of conscience, expression, assembly and association; and special measures of protection taken under article 14 of the Covenant with regard to the situation of street children.

17. Mr. ARRANZ (Guatemala) said that the Presidential Human Rights Commission (COPREDEH) had a broad programme of human rights education, which included dissemination of the Covenant, and that document had reached over 97,000 people in 1995. A handbook on human rights was used in the educational system established by the Ministry of the Interior for refugees and displaced persons and was distributed to most libraries in both Spanish and Mayan languages. A one-year seminar in human rights education was a requirement for a secondary-school diploma, and seminars and workshops on human rights were also held in the non-formal educational sector. The Counsel for Human Rights used his network of regional offices to disseminate the Covenant. The army and police were also receiving human rights training. The Government had issued a press release announcing that it would be submitting its report to the Human Rights Committee, although the report itself had not been published.

18. Turning to the question of the difficulties affecting the implementation of the Covenant in Guatemala, he said that the economic crisis was primarily responsible for conditions that led to many of the violations of domestic law

and laws implementing the Covenant. The past 35 years represented a period of confrontation during which substantial resources had been devoted to the military, rather than to meeting the most urgent needs of the population. A process of negotiation aimed at a firm and lasting peace had been initiated and it was to be hoped would help to reverse that situation. Poor transportation and communication infrastructure had led to the marginalization of many segments of the population, in particular the indigenous groups. The high rate of illiteracy in Guatemala, estimated at between 40 and 50 per cent, was also a major problem that had only recently been somewhat reduced.

19. Progress had also been made in ensuring the participation of more women at all levels of political, economic and social life as a result of legal reforms aimed at achieving gender equality. In particular, labour laws had been amended to prevent discrimination in hiring practices. Nonetheless, women continued to suffer discrimination as a result of entrenched social attitudes and their participation in decision-making posts in the Government was still limited. For example, 11 out of a total of 80 deputies were women. In the 1994 election out of a total of 866 candidates, 109 were women, 6 of whom were elected. Five mayors out of 300 in the country were women. The percentage of women in the private sector was higher, especially in service industries and the number of women holding high-level management positions was also on the rise as more and more women completed higher education. Currently, 40 per cent of all students in Guatemala were women.

20. Referring to the question of confessions obtained under torture, articles 8 and 9 of the Guatemalan Constitution provided that those statements had to be made before the competent judicial authorities to be admissible in court; statements made under torture were inadmissible.

21. Since 1984, United Nations Standard Minimum Rules for the Treatment of Prisoners had been included in the rules and regulations of detention centres in Guatemala. Currently, the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA), in coordination with the Congress, several ministries and representatives of the judiciary, had organized working meetings and seminars on the subject of the treatment of prisoners in detention centres with a view to drafting an organic law for the prison system. Efforts had also been made through the human rights Procurator to disseminate information on standard minimum rules for the treatment of prisoners to the prisoners themselves.

22. Under the Constitution, the State was obligated to ensure that inhabitants enjoyed their rights under the Constitution. However, in the case of an invasion of the national territory, a grave disturbance of the peace or a threat to the security of the State, the rights referred to in articles 5, 6, 9, 26, 33, 35 and 116 of the Constitution could be suspended by the President by a decree issued through the Council of Ministers in the interest of public order. The decree had to state the reasons justifying the decision, the territory involved and the period during which the decision would be in effect, could not exceed 30 days. With regard to the right to participate in the conduct of public affairs, the Constitution stipulated that only Guatemalans could be President, Vice-President or a Deputy in the Congress.

23. The fourth report of the Director of MINUGUA covered the period from 21 August to 31 December 1995 and contained general conclusions regarding the situation of human rights in Guatemala. The report stated that the overall level of violence and intimidation was affecting the work of journalists and freedom of expression in Guatemala. With regard to freedom of association, the report indicated that verification had revealed cases of harassment directed against non-governmental organizations. Therefore, there were certain limitations to freedom of expression and association in Guatemala.

24. Finally, with regard to the problem of street children, a standing board had been established in May 1995 to ensure institutional coordination and to provide follow-up to specific cases. The board was composed of representatives of the Human Rights Committee, the National Police and the Ministry of Public Health and Social Assistance. While the board had not yet achieved the goals for which it had been established, it had already yielded some positive results as a result of inter-institutional cooperation.

25. Mr. KRETZMER asked which crimes, apart from murder, were subject to the death penalty in Guatemala and what he thought about the amendment passed in March 1995 to extend the application of the death penalty to the crime of trespass.

26. The Committee had received information from the International Confederation of Free Trade Unions indicating that under Guatemalan law strikes by agricultural workers at harvest time were banned and the Government had the power to ban strikes it deemed would seriously affect the national economy and to employ the police force to ensure continuation of work in the event of an unlawful strike. There had also been disturbing reports of harassment and intimidation of trade union members and their families. In that connection, he asked what steps the Government had taken to protect trade union members and their leaders and what its response was to reports that foreign companies operating factories in Guatemala had sought the help of the Government to prevent the formation of trade unions.

27. Ms. MEDINA QUIROGA asked who decided what constituted a secret document or secret information under article 30 of the constitution and in what ways the right to information was limited.

28. Ms. EVATT said that the Committee had received information regarding proposals to reform the Criminal Code in order to remove any discriminatory features and she wondered whether there were also plans to revise Civil Code. She asked if any educational programmes had been developed in order to enhance the appreciation of members of the judiciary of the application of human rights and equality standards under the Covenant and other international instruments.

29. Mr. ARRANZ (Guatemala) said that the death penalty could be imposed in Guatemala for the crimes of homicide and assassination. However, as a result of social and political pressures, and over the objection of the Executive and the Government, the death penalty law had been extended by Congress to include the crime of the kidnapping following a wave of kidnappings in the country. On the other hand, it was always possible to appeal the death sentence on the basis of

unconstitutionality and in the case of kidnapping, the death penalty was only applicable if the individual kidnapped had been killed.

30. Mr. ALONZO (Guatemala) said that article 102 (u) of the Constitution protected the right of workers to form trade unions without discrimination or prior authorization. Accordingly, workers could not be fired for joining a trade union. Since 1994, the procedures required to form a trade union had been simplified and the paper work had been reduced by 50 per cent.

31. Mr. ARRANZ (Guatemala) said the Government, through the Ministry of Labour and Social Insurance, followed up all reports of threats made to members of trade unions and in no way condoned intimidation of trade union members. The Government was conducting a review of the treatment of workers in the maquila industry where conditions did not meet the basic minimum requirements of the Labour Code or those of the trade unions, with a view to demanding that minimum compliance.

32. Mr. ALONZO (Guatemala) said that the President and appropriate government organs decided which issues were considered to relate to national security.

33. Mr. ARRANZ (Guatemala) said that in order to exercise a profession publicly in Guatemala, membership in a professional association was mandatory. The law applied to the public sector but not private enterprise. An exception was made in the case of journalists who had refused to join professional associations.

34. Mr. ALONZO (Guatemala) said that in December of 1995, the Presidential Commission on Human Rights and the National Office for Women had conducted a seminar aimed at identifying aspects of the Civil Code that could be seen as discriminatory and unconstitutional.

35. Mr. ARRANZ (Guatemala) said that MINUGUA was involved in teaching and interpreting the application of international human rights treaties in Guatemala. Specifically, MINUGUA had been providing assistance to the Judicial Training School through an ongoing programme for the training of judges and magistrates.

36. The CHAIRMAN invited the members of the Committee to make their concluding comments on the initial report of Guatemala.

37. Mr. BRUNI CELLI expressed his appreciation for the candour with which the Guatemalan delegation had conducted a dialogue with the Committee and welcomed the evident progress made by the State party in the field of human rights. It would be helpful, however, if future reports adhered more closely to the guidelines set out in the Manual on Human Rights Reporting prepared by the United Nations Centre for Human Rights.

38. Ten years of civilian Government had brought a welcome shift of power away from the military to the civilian authorities. During that period, Guatemala had also ratified the Covenant and the Optional Protocol thereto and had created an Office of the Human Rights Procurator and a Presidential Commission for Coordinating Executive Policy in the Field of Human Rights (COPREDEH). Its

cooperation with the international community, and with the United Nations in particular, in the field of human rights had been commendable.

39. A number of problems still remained, however. Despite peace negotiations, the internal conflict persisted. Political will was needed to bring the negotiations, which were frequently interrupted for trivial reasons, to a successful conclusion. The military still wielded considerable influence over the civilian Government and the problem of impunity had not been effectively addressed. Reports continued to be received of summary executions, disappearances, torture and arbitrary arrest carried out by the military and other armed groups, such as the Civil Self-Defence Patrols (PACs). The intimidation of journalists and human rights activists was also reported to be widespread.

40. The issue of PACs had been brought to the attention of the Government by concerned non-governmental and human rights organizations. While other countries in the region, including El Salvador and Peru, had had recourse to local self-defence patrols to protect communities against armed attack, the existence of large groups of trained and armed personnel operating under no direct supervision posed a threat to public safety after peace was restored.

41. On the question of impunity, which was frequently viewed in the region as a solution to the problem posed by the military, the Government must guarantee the right of victims not only to learn the truth about the human rights violations perpetrated against them and their families but also to receive just compensation for their suffering.

42. Ms. MEDINA QUIROGA said that formal legislation was not enough to protect the human rights of Guatemalans. The military had to be brought under civilian control and the culture of conflict had to give way to a culture of peace. The considerable social and economic benefits which the military derived from its hold on power, however, made that task a difficult one.

43. Nevertheless, it was imperative for Guatemala to bring its domestic laws into line with the provisions of the Covenant. In that regard, it was a matter of some concern that the independence of the Guatemalan judiciary could be affected by the absence of regulations governing the career of judicial officers and by the practice of appointments to the Supreme Court and the Court of Appeal through political negotiation. The supervision of judges by non-judicial appointees was also a potential source of conflict.

44. Much remained to be done to improve the status of women and children in Guatemala. The current status of children, in particular, was unacceptable to the international community and absolute priority must be given to remedying that situation.

45. Mr. BUERGENTHAL said that claims, such as those made in paragraphs 40 and 41, made the earlier initial report of Guatemala (CCPR/C/81/Add.7) more of a fairy tale rather than a reflection of the reality in that country. The Guatemalan delegation's repudiation of that report was therefore most welcome. He hoped, moreover, that the delegation's exemplary candour was a reflection of

the new Government's commitment to putting an end to the human rights abuses of which the people of Guatemala had so long been the victims.

46. Progress was unlikely in Guatemala, however, unless the war was brought to an end and peace restored. In his view, the military played too active a role in formulating the Government's policy in peace negotiations and he hoped that the Government now had the power and the political will to reduce the military's role in that process. Unfortunately, he remained unconvinced that the military had undergone any significant change in attitude.

47. The human rights violations committed by both sides in the conflict must be made public, those responsible identified and compensation paid to the victims. It was an inescapable fact that the economic power wielded by the military was derived from the human rights abuses which it had committed during the previous decade and that the victims of those abuses were the poorer classes. Their situation would remain unchanged unless a system of compensation was put into place.

48. The United Nations, through its Human Rights Verification Mission in Guatemala (MINUGUA), had an important role to play in restoring peace to that country. Without the Organization's continued presence, it would be impossible to put an end to impunity and to break the hold of those groups in Guatemala which had a vested interest in the continuation of the conflict. He welcomed the current Government's efforts to replace the culture of fear by a culture of peaceful coexistence and wished the Government and people well in the difficult task that lay ahead.

49. Lord COLVILLE said that, because of his own deep concern over the human rights situation in the United Kingdom, and particularly in Northern Ireland, where the deployment of large numbers of military personnel among the civilian population had created many problems, he understood the problems faced by Guatemala and wished to express his solidarity with the people of that country.

50. For many years, the human rights situation in Guatemala had been exacerbated by the violence of the civil war as well as by other types of violence perpetrated under the pretext that they were justified by the war. The problem was compounded by the lack of public confidence in the judicial authorities and the absence of the rule of law. The courts functioned slowly or not at all and there was an urgent need for supervision of the judicial process. If, as the delegation of Guatemala claimed, the military had accepted that the war was over, then it was time to change the nation's priorities and to return to civilian rule by a civilian Government with a civilian police force ensuring public order. It was vitally important to allocate more resources to the police for manpower and equipment and to the courts in order to ensure respect for those institutions and for the rule of law. An effective police force would also make PACs unnecessary.

51. With regard to the former members of the now disbanded guerrilla groups, he said that the experience of other countries had shown that it was possible to reintegrate them into society.

52. He had every confidence in the Supreme Electoral Tribunal whose current distinguished membership was the best guarantee that future elections would be free and fair.

53. Mrs. CHANET said that she had no doubt about the will of the civilian authorities of Guatemala to break with the practices of the past. By itself, however, political will could achieve little without adequate resources. It was absolutely essential to cleanse the military, eliminate private militias and reorganize the police force. Unless this was done, the civil authorities would be paralysed at every rumour of a coup d'état. The Committee's dialogue with the Guatemalan delegation, however, had given it grounds for cautious optimism and she hoped that later events would prove that that optimism was not misplaced.

54. Mr. EL-SHAFEI said that the example of other countries had shown that the many problems which Guatemala faced in implementing the provisions of the Covenant were not insoluble. Indeed, there were encouraging signs of progress towards solutions, although much still remained to be done during the current period of transition to civilian rule.

55. The Committee had received many reports about violations of the rights of returning refugees, but court decisions ordering the arrests of those responsible had not been carried out. That behaviour brought into question the authority of the judiciary and its ability to enforce its rulings. Despite the good intentions of the new government in banning the use of force - whether by the army or civil patrols controlled by the army - in troubled areas, and given Guatemala's past history, the Committee doubted that all the groups involved had truly had a change of heart. It was difficult to apply the Covenant in a troubled situation so long as strong elements were opposed to peace. However, the best solution was to enforce the rule of law and punish those responsible for human rights violations and for failing to respect Guatemala's international obligations. He expressed the hope that Guatemala would continue down the road towards peace and that the next report would be more positive.

56. Mr. KLEIN said that, given the human rights situation in Guatemala, the ratification of the Covenant and the acceptance by Parliament of the Optional Protocol - soon to be ratified - were courageous steps. Domestic law must be brought into full conformity with the Covenant; it must for example honour the obligation to compensate those whose rights had been violated.

57. He had also been touched by the determination of the new government to make progress, and by their desire to exert control over the security forces and try the persons responsible for violations, even at the highest levels of the police, military or government. It was essential, however, that such trials actually take place. It was encouraging to find that the delegation had been very frank and had attempted to hide nothing since the truth was the soundest basis for moving forward, restoring the people's confidence in the Government and dissipating the climate of fear which reigned in the country. The necessary changes would take time but it was essential that more be done to help the plight of street children, especially by changing the attitudes of the police. Children were the most vulnerable element of society; the State had an absolute duty to protect their rights. He hoped that armed hostilities would not break

the fragile peace in the country and reiterated his good wishes for the future of Guatemala.

58. Ms. EVATT expressed her satisfaction with the supplementary information provided by the delegation; it had compensated for her disappointment with the grossly inadequate written report. The country still faced immense problems, especially that of the impunity of uncontrolled elements within the military and security forces acting with the authority or tacit support of the State. Motivated by the desire for political and economic power, land and commercial advantage they resorted to murder, violence and threats to stamp out opposition.

59. The indigenous people and the poor were most certainly victims of the situation despite what was stated in paragraph 93 of the report, as were children who were reduced to living in the street and often mistreated. Those who sought to speak for others also suffered - journalists, trade unionists, activists of all kinds - and women, who were subjected to violence and rape.

60. The root causes for the situation were very complex and solutions would be slow in coming but it was essential that those responsible for violations be prosecuted and that the civil patrols be disbanded.

61. Mr. KRETZMER said that it was difficult to know what advice to give to the delegation, since unfortunately Guatemala was in a situation where most of the articles of the Covenant were being violated, either by the laws or, in practice. While he appreciated the desire of the new Government to reform State institutions, it was just as important to strengthen such institutions of civil society as the trade unions which played an important role in guaranteeing human rights. Many union activists were subjected to harassment, violence and even rape. Priority must be given to guaranteeing the rights of those and other victims and to protecting them against violence on the part of the military, the police or other armed groups. It was also essential to protect the rights of street children and children in general.

62. Mr. BHAGWATI thanked the delegation representing the new Government for its candour and courage in dispelling the false impression created by the original report. The adoption of the Optional Protocol, the creation of the Office of the Human Rights Procurator, the organizing of COPREDEH (the Presidential Commission for Coordinating Executive Policy in the Field of Human Rights), the Comprehensive Agreement on Human Rights signed with URNG - all showed the Government's determination to build a new Guatemala based on democracy, the rule of law and human rights. He hoped that the dialogue with the Committee would help the Government to dismantle the networks of violence and set up and strengthen the institutions of a democratic society. He was glad that the military seemed to have changed its attitude and was willing to cooperate, although he was sceptical about their willingness to give up power.

63. Economic reconstruction and social justice must be the Government's new priorities. Those guilty of violations of human rights must be punished. Notwithstanding poverty, illiteracy, and the uneven distribution of economic power, Guatemala should not lose hope and should continue to have faith in the capacity of its people to bring about change.

64. Mr. FRANCIS was encouraged by the information provided by the delegation and was certain that the new Government would continue to make progress. He was concerned about the influence of the rapacious absentee military class which had enriched itself over the years. He felt that Guatemala's problems should be seen in the context of a development strategy aimed at providing the social services necessary to bring peace, coexistence and prosperity to all segments of the population.

65. The CHAIRMAN, speaking in his personal capacity, and as a Central American, thanked the delegation for its candour. Its attitude reflected the attitude of the new Government and President. He hoped that the peace process would continue to go forward, a hope shared by 30 million Central Americans. The problem of violence in Guatemala had begun some 500 years before the civil war and the country now had to overcome its legacy of poverty, discrimination and violence. He hoped that the conflict would end and that the climate of fear would give way to one of peaceful coexistence and freedom.

66. The Government had yet to resolve the problems of the police force which was undermanned and the civil patrols which were too large, and which were not true security forces, whose function was to protect the people. He also believed that the Optional Protocol should be ratified promptly and that the statutes of the Central American court of justice should not be ratified until human rights concerns were resolved.

67. Mr. ARRANZ thanked the Committee for its understanding and encouragement, which could only reinforce the Government's commitment to reform. As the President had said before the European Parliament pressure must continue to be put on all parties, especially those who were opposed to peace, in order to ensure further progress. The Committee's criticisms were constructive: they provided hope and direction for the future. The new Government was committed to the future, to the truth, to recognizing reality and to finding solutions for the country's problems.

The meeting rose at 6.05 p.m.

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HUMAN RIGHTS COMMITTEE

Fifty-sixth session

SUMMARY RECORD OF THE 1492nd MEETING

Held at Headquarters, New York,
on Friday, 29 March 1996, at 10 a.m.

Chairman: Mr. AGUILAR

later: Mr. EL-SHAFEI
(Vice-Chairman)

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GENERAL COMMENTS OF THE COMMITTEE

Draft general comment on article 25 of the Covenant

This record is subject to correction.

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96-80415 (E)

The meeting was called to order at 10.20 a.m.

GENERAL COMMENTS OF THE COMMITTEE

Draft general comment on article 25 of the Covenant (CCPR/C/53/CRP.1)

Paragraph 21

1. Ms. EVATT said that agreement had previously been reached on replacing the first sentence by the following: "Subparagraph (c) deals with the right and opportunity of citizens to have access to public service on general terms of equality. It covers appointment, promotion and dismissal in respect of public service positions such as the career civil service, the military, police and security services". That wording was intended to cover the point raised previously that there was a need to distinguish between political positions, such as personal advisers, on the one hand, and positions which must be protected from political pressure, on the other. She also proposed the deletion of the last part of the penultimate sentence, reading "but no one ... discriminatory grounds".

2. Thus worded the paragraph would expand on article 25 (c) of the Covenant, with an emphasis on merit and equal opportunity and freedom from discrimination on the ground of political opinion.

3. Mr. KLEIN said that he had difficulties with the fourth sentence of the original draft of paragraph 21. In Germany, public officials at the highest level were subject to dismissal when the Government changed, with payment of monetary compensation. It was of obvious importance for the Government and the senior levels of the civil service to share the same political views in the interest of administering the country. Great care should be taken in respect of the wording proposed to replace the original first sentence. The last sentence of paragraph 21 should also refer to judicial protection.

4. Mr. BRUNI CELLI said that in some national systems express mention was made of the situation of officials in senior positions linked to the Administration. Perhaps that point should be taken into account in the general comment, since there was no doubt that at senior levels the Government must enjoy confidence in its officials.

5. Mr. BÁN noted that the amended first sentence referred to "appointment, promotion and dismissal", whereas the last original sentence also referred to "suspension" and "removal"; consistent language should be used. He had doubts regarding the use of the word "merit", since in many countries public service included such modest occupations as clerical workers in post offices, where the concept seemed inappropriate. Use of the term also suggested that someone deserved to be appointed on political or other grounds. The question of political opinion had previously been tackled with reference to paragraph 14, where the Committee had taken the position that it should not be used as a ground to deprive any person of the right to stand for election. That same principle could be applied in respect of paragraph 21.

6. Mr. FRANCIS said that the approach taken in Jamaica was for new Governments to transfer to different ministries senior officials thought to be politically biased, but their tenure was maintained. Any attempt to influence a minister as a result of political affiliation would be countered by the minister's advisers.

7. Mr. BHAGWATI said that there were some positions in the public service that were not of such importance that there was any need to insist on appointment exclusively on merit. The third sentence of the original draft could thus be worded "Basing the public service on equal opportunity ...". While it would be appropriate in general to ensure that there was no discrimination on the ground of political opinion, there were positions where political opinion matched, for example, that of Attorney-General. Some clarification was required.

8. Mr. KLEIN said that in view of the differences between civil service structures in different countries it would be dangerous to approach the issue of political opinion narrowly. In the German system it would be simply impossible to keep a Secretary of State, the highest level of the civil service, if his or her political views differed from those of a new minister, neither could such a person simply be transferred to a different ministry. Thus, in Germany, the two highest levels were referred to as "political" civil servants. While the independence of the civil service was guaranteed for all lower ranks, such senior officials were subject to dismissal on political grounds. He did not support deletion of the word "merit", as the concept was essential to any public service.

9. Mr. El-Shafei, Vice-Chairman, took the Chair.

10. Mr. LALLAH said that if appointing authorities used a criterion other than merit, it would amount to arbitrariness. Since the Covenant required that rights in that regard should be subject to judicial review, the courts must know what the criteria were. It would be difficult to devise any suitable criterion other than merit, and the person with the greatest merit should necessarily be appointed. Nevertheless, appointments such as Attorney-General were political by their very nature. In any event the Committee could not, in a general comment, diminish the foundation of article 25; the Committee simply could not say that it was possible to discriminate on the basis of political opinion when article 25 said the contrary. In Mauritius even the most senior civil servants were supposed to serve in an apolitical capacity, even though they were entitled to hold political opinions, a right protected by both the Constitution and the Covenant.

11. Mr. KRETZMER agreed that the Committee could not possibly include in a general comment a statement that was inconsistent with an article of the Covenant. The aim of the general comment was to interpret the Covenant, and the Committee must not go beyond that by giving a general view of what the best form of government was, that clearly being beyond its mandate. The Committee should also bear in mind that its general comments applied to some 140 countries, each with its own conceptions of public service and of which officials should change on the accession of a new Government. Given that the Committee, in draft paragraph 22, supported affirmative action, with respect to paragraph 21 perhaps merit was not the primary consideration in all cases. The Committee would do better simply to delete the sentences referring to merit and to discrimination

on the ground of political opinion, since the earlier sentences stated that the criteria must be reasonable, objective and non-discriminatory. No further elaboration was necessary.

12. Mr. FRANCIS said that merit was an essential component in the appointment and evaluation of public servants; however, he was also in favour of equal opportunity policies, as referred to in paragraph 22. It should be borne in mind that political appointees and civil servants could not be put in the same category for that purpose. Each country should find its own way of categorizing public employees in compliance with article 25 of the Covenant.

13. Mr. BHAGWATI agreed that the concept of merit was very important. However, there was a danger that the content of paragraph 22, regarding affirmative measures might conflict with the principle of appointment and evaluation on a strict merit basis.

14. He suggested that the third and fourth sentences of paragraph 21 should be replaced with some wording to the effect that it was necessary, in order to preserve the public service from political interference or pressures, that it should be based on merit and equal opportunities, with security of tenure, subject to the exceptions set out in paragraph 22; and that it was of particular importance to ensure that there was no discrimination on the ground of the political opinion, except where the public service position was of a political character.

15. Ms. EVATT agreed with Mr. Bán that the wording of the paragraph should be consistent, referring to suspension and removal as well as appointment, promotion and dismissal. However, she could not agree with Mr. Kretzmer that the second and third sentences of the paragraph should simply be removed, since they contained statements which were of considerable importance, concerning freedom from political interference and the prevention of discrimination on ground of political opinion. The latter was the most sensitive issue dealt with in paragraph 21 and the Committee could not be silent on it.

16. The beginning of the third sentence should perhaps be reworded to read "Basing public service on equal opportunity and on general principles of merit ...". She agreed with Mr. Bhagwati's suggestion that reference should be made to the exceptions provided for in paragraph 22. She did not see affirmative action policies as being necessarily inconsistent with the merit principle; people who benefited from affirmative action policies still had to be qualified.

17. The question of political opinion, dealt with in the fourth sentence, was a much more difficult issue. Clearly, there were sensitive positions of a political nature in public service, and it was generally agreed that in such cases Governments should be given some leeway to make choices on political grounds. She suggested that the sentence might be amended to the effect that political opinion should not as a general rule be a ground of discrimination, and that if necessary the words "except where the position is of a political character" could be added.

18. Mr. KLEIN suggested that the end of the final sentence of paragraph 21 should be amended to the effect that State reports should also describe the judicial protection public servants or officials might have in that respect.

19. The CHAIRMAN said that a new draft could be prepared for consideration at the Committee's next meeting.

20. Mr. LALLAH said that he would support the use of the expression "general principles of merit" in the third sentence, and that it was important to retain the reference to the ground of political opinion in the fourth sentence. He supported Mr. Klein's suggestions regarding the wording of the final sentence of the paragraph.

21. Mr. BHAGWATI supported the suggestion to use the expression "equal opportunity and general principles of merit" in the third sentence, as well as the requirement for State reports to describe the judicial protection available to public servants. However, the wording concerning political opinion would be too broad unless it was qualified in some way. He suggested that the words "political opinion" should be followed by "except where the public service position is of a political character".

22. Mr. FRANCIS said that it would be wrong to water down the sentence concerning political opinion; the role of civil servants was administrative, not political.

23. Ms. EVATT proposed that the Committee should proceed to discuss the next paragraph. Before the next meeting, a new draft would be produced, taking account of the various suggestions that had been made.

Paragraph 22

24. Ms. EVATT proposed that the first sentence of the paragraph should be amended to read: "Affirmative measures should be taken to ensure that citizens belonging to parts of the population which are under-represented in public service, for example, women, minorities and indigenous people, have an equal opportunity to have access to public service". The second sentence of the paragraph would remain unchanged.

25. Lord COLVILLE said that he had very serious reservations about the entire paragraph; he did not see how it could be consistent with article 26 of the Covenant. If affirmative measures were allowed in the appointment of public servants, they must not take an exclusive role in such a way that those who did not belong to under-represented minorities were excluded. He suggested that the word "reasonable" should be added before "affirmative measures", to avoid enabling public authorities to take extreme positions, discriminating against candidates from non-minority groups who were equally meritorious and should also be considered.

26. Mr. BRUNI CELLI agreed that there was a danger of encouraging quota systems, which conflicted with the principle of equal access contained in the second sentence of the paragraph. The concept of "representation" of different parts of the population should be reviewed very carefully.

27. Mrs. CHANET shared the concerns expressed by the two previous speakers regarding discrimination and quota systems.

28. Mr. KLEIN said that affirmative measures were sometimes necessary to ensure equal opportunity for under-represented groups. However, he agreed with Ms. Evatt that such measures should not detract from the requirement of merit, and that principle should be reflected in paragraph 22. The meaning of "under-representation" should be defined more clearly.

29. Mr. LALLAH said that he strongly supported affirmative action in appropriate circumstances, but difficulties always arose when an attempt was made to incorporate it in a general rule, and the problem would be particularly complex in countries where many different minority groups existed. There could also be conflicts with other international instruments and with article 26 of the Covenant. The matter of affirmative measures would be most appropriately dealt with in individual cases.

30. Mr. BHAGWATI said that he himself was an advocate of affirmative action, a policy which in India had been applied systematically and upheld by the Supreme Court. Equality of opportunity consisted in having regard to the past and continuing handicaps of a disadvantaged minority or majority. Where de facto inequality existed, the imposition of de jure equality would only accentuate it. De facto equality for all could be achieved in either of two ways: by giving advantages to the more vulnerable groups, or by placing handicaps in the way of the more fortunate. Affirmative action did both. The text, however, was perhaps worded too broadly and he proposed amending the opening sentence to read: "Reasonable affirmative measures may be taken in appropriate cases to ensure that citizens belonging to under-represented parts of the population have an equal opportunity to have access to public service." That would allow the authorities some flexibility.

31. Mr. KRETZMER said that he would prefer something stronger than "may be taken", which merely suggested that affirmative action was not inconsistent with the equality clause. The Committee was trying to give direction to States.

32. Mr. FRANCIS said that he supported Mr. Bhagwati's amendment, but that he disagreed with Lord Colville. Article 26 should be read in conjunction with article 25 and if that was done, article 25 satisfied article 26 in respect of equality before the law and the idea of "one man, one vote".

33. Ms. EVATT agreed that the original wording was perhaps too bold. She therefore would support Mr. Bhagwati's amendment but would amend the second part of the sentence as well, to read: "...to ensure that members of all sectors of society have equal access to public service".

34. Mr. KLEIN, noting that affirmative action usually referred to women and generally recognized minorities, said that the term "all sectors of society" was much too broad and could encompass any group - homosexuals, for instance, or persons of different beliefs - who could claim to be under-represented.

35. Ms. EVATT, supported by Mr. BHAGWATI, concurred, and suggested replacing the phrase "members of all sectors of society" by the phrase "women and minorities".

36. Mrs. CHANET said that then the problem arose of what specific minorities were being referred to.

37. Mr. LALLAH said that he was not sure it was just a question of wording. He felt there was substantive disagreement among members, who were not clear in their own minds about the whole question. Perhaps the term "minority groups" might be preferable to "minorities". Indigenous peoples or persons of mixed race, for instance, might be majorities but might still be denied their rights. The key was to ensure equal opportunity of access. Equality did not mean that there could not be differentiation on reasonable criteria.

38. Ms. EVATT observed that the point addressed in paragraph 23 was important, because, especially in the area of public service, the State had power to act and must do its utmost. She proposed revising the second part of the sentence to read: "to ensure that the right of equal access to public service is effective for all citizens". That affirmed the main point without raising the question of quotas or other problems.

39. Mr. LALLAH asked whether one would then still speak of "women and minority groups" in the last sentence of the paragraph. He believed that the solution had been to encompass all kinds of minorities and there, indigenous groups had been left out.

40. Ms. EVATT, supported by Mr. BHAGWATI, said that the last sentence was simply asking for information in the usual terms used by the Committee. However, if it was a problem, the phrase, "the percentage of women and minority groups in public service positions" could be deleted, so that the third sentence would read: "Reports should indicate how the requirement for equal access is met and whether affirmative measures have been introduced, and if so, to what extent".

41. Lord COLVILLE suggested that the words "to public service" should be added after the word "access".

42. The CHAIRMAN said that he took it the Committee wished to adopt paragraph 22, as amended.

43. Mrs. CHANET said that she still did not agree in principle, so there was no consensus. The paragraph should be bracketed, for further discussion.

44. It was so decided.

Paragraph 23

45. Ms. EVATT said that paragraph 23 concerned the judiciary, considered as a special aspect of public service, since it exercised power while remaining separate from and independent of the political process and being accountable primarily to the constitution and laws of a State. The third sentence of the

paragraph, stating that the judiciary must remain independent of interference or control by other arms of government conveyed the central idea. The paragraph then went on to deal with the conditions of service and the discipline and dismissal of judges. The next two sentences referred to the three methods of appointment of judges, and the paragraph concluded by stating that whatever method applied, access to the judiciary should be non-discriminatory.

46. There had been difficulty in deciding where to locate the judiciary in the context of article 25, but it had finally been decided to place it under subparagraph (c) regarding equal access to public service.

47. Mr. BRUNI CELLI said that the paragraph should be streamlined, and should state simply, without analysing the relation to the political process or to other branches of government, that the judiciary was a special aspect of public service primarily accountable to the constitution and laws; that its independence must be safeguarded by appropriate conditions of service and disciplinary measures; and, without going into the three methods of appointment of judges, that whatever method applied, access to the judiciary should be non-discriminatory.

48. Mr. BÁN said that the placement of paragraph 23 was probably acceptable, but that its relationship to paragraph 21 was unclear. He was unsure if the general requirements for public service put forward in paragraph 21 were automatically applicable to paragraph 23 or if they were only applicable unless otherwise stipulated in paragraph 23. Most of the criteria did seem to apply in paragraph 23, although he was concerned that the most important of all - security of tenure - had not been adequately stressed.

49. Mrs. CHANET said that she had serious reservations about paragraph 23, perhaps because she was a member of the judiciary in a country where judges were not considered part of the public service. Overall, the paragraph seemed to reflect a point of view that did not apply to some judicial systems. Moreover, it mixed up a number of issues that had no bearing on equality of access to public service, for example the independence of the judiciary. The observation that the judiciary was a special aspect of public service and the references to remuneration and conditions of service also confused the issue and had little to do with conditions of access to public service. Paragraph 21 already covered such criteria.

50. Mr. PRADO VALLEJO endorsed Mrs. Chanet's view that the administration of justice was not a public service. The judiciary was part of government. In his view, the phrase "special aspect" in the first sentence of paragraph 23 had no meaning; if anything, the judiciary was a special organ or branch of government. The remark in the second sentence that the judiciary was guardian of the rule of law was also misleading. The administration of justice meant the implementation of laws. The Congress and the Government of a country were the entities entrusted with safeguarding the rule of law. On the other hand, he did agree that the independence of the judiciary and its freedom from outside interference were of fundamental importance. In that connection, he reminded the Committee that judges in some countries received very low salaries. In order to ensure their continued independence from outside pressures, it might be preferable to talk about providing reasonable and fair remuneration rather than protecting

salaries and conditions of service. On balance, he thought it better to delete the list of methods by which judges could be appointed since there were significant differences between systems around the world; a reference to "whatever system" would suffice.

51. Mr. BHAGWATI agreed that judges were public service functionaries rather than public servants in the narrower sense. In fact the issues raised by paragraph 23 seemed to fall more naturally within the scope of article 14 of the Covenant. Wherever the Committee ultimately decided to place the remarks in paragraph 23, it would be important to state that the judiciary should be independent and should enforce the rule of law, that it should be accountable to the constitution and the laws, and that judges' salaries should be adequate with respect to the standard of living and their status. Judges should enjoy fair and just conditions of service and security of tenure. Appointments to the judiciary should not be subject to the political process and should be on the basis of merit. The Committee might also refer to the principles on the independence of the judiciary that had been adopted by the United Nations General Assembly.

52. Mr. FRANCIS said that members of the judiciary were public officials in the same way that politicians were. Article 25 of the Covenant expressly referred to "every citizen" and "public service", so there was no escaping the fact that the judiciary also fell within the scope of the article. He suggested that those members of the Committee who were practising judges should form a drafting group to formulate a more acceptable wording, bearing in mind the remarks made by Mr. Bruni Celli.

53. Mr. KRETZMER wondered whether the difficulties which Mrs. Chanet and Mr. Prado Vallejo had with the text of paragraph 23 might not be semantic in nature, since there was a clear distinction between "public service" in general and "the public service" in particular. In that respect the judiciary was indeed a special aspect of public service, but he indicated that any remarks about the independence of the judiciary were inconsistent with the provisions of article 25 (c) of the Covenant. That article implied that all qualified citizens should enjoy the right of access to judicial posts. He endorsed the proposal made by Mr. Francis, on condition that the provisions of article 25 (c), were strictly borne in mind.

54. Mr. KLEIN asked for clarification as to the distinction between public service and the civil service, bearing in mind that the previous paragraphs of article 25 had clearly identified specific instances of public service.

55. Lord COLVILLE endorsed Mr. Bhagwati's comment that the points raised in paragraph 23 belonged more properly within the scope of article 14 of the Covenant. In addition, the Committee's draft general comment in paragraph 13 covered the same points. Commenting on Mr. Francis's suggestion to set up a drafting committee, he indicated that the text as it stood would pose a problem of compliance for the United Kingdom authorities since the vast majority of court cases there were dealt with by unpaid lay magistrates.

56. Mrs. CHANET said that the French text of article 25 (c) spoke of "fonctions publiques", which should be interpreted as embracing all aspects of government. The judiciary, like parliament and the office of Head of State, should be dealt with in paragraph 23 only with regard to equality of access to appointments to such posts.

57. Mr. LALLAH said that the emphasis of article 25 of the Covenant was on citizens and their free access to public service in the broadest sense. Any remarks that the Committee chose to make regarding the independence of the judiciary should be reserved for article 14, otherwise States parties may get the wrong message about the thrust of article 25.

58. Ms. EVATT said that there seemed to be a consensus to delete the list of various methods of appointment to the judiciary. Regardless of the method of appointment and how judges fitted into State structures, they should be independent and stand apart from the political process. However, if the Committee wished to single out the judiciary and make observations about its role and function, it would automatically have to confront the issues raised in paragraph 21. In order to avoid any disagreements regarding the special status of the judiciary and what aspects of their functions did or did not fall within the scope of article 25 (c), it would be simpler to withdraw the entire paragraph and take up the issues raised therein in another context.

The meeting rose at 1 p.m.